77-306

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM R. HALL,	)	Review of the
	)	Appellate Court
Peitioner-Defendant,	)	of Illinois, Fourth
	)	District
vs.	)	
	)	No. 77-25
PEOPLE OF THE	)	
STATE OF ILLINOIS,	)	
	)	
Respondent-Plaintiff.	)	

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted by:

RONALD L. CARPEL
Attorney at Law
129 South Water Street
P. O. Box 309
Decatur, Illinois 62523
Attorney for Petitioner-
Defendant

JURISDICTIONAL STATEMENT

By this Petition, Petitioner seeks review of a decision by the Illinois Appellate Court, Fourth District, filed on the 3rd day of February, 1977, (attached hereto) affirming the judgment of conviction of the Circuit Court of Macon County entered on December 17, 1975. Because the Supreme Court of Illinois denied Petitioner's Request for Leave to Appeal to that Court on May 26, 1977 (attached hereto), the United States Supreme Court has jurisdiction to review by Writ of Certiorari according to Title 28 Section 1257 (3) of the United States Code which Section permits review of final judgments entered in State Court by the highest Court in which the decision could be had "where any title, right, privilege or immunity is specially set up or claimed under the Constitution."

QUESTIONS PRESENTED FOR REVIEW

1. Whether the use of a fictitious name upon a Complaint for Search Warrant renders a Search Warrant void as violative of the Fourth and Fourteenth Amendment to the United States Constitution.

2. Whether the Complaint for Search Warrant in the instant case failed to establish probable cause and rendered the Search Warrant issued therefrom void in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S.C.A. Const. Amend. 4, The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized.

U.S.C.A. Const. Amend. 14 Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On October 27, 1975, a Complaint for Search Warrant was executed by an unknown person namely, "John Doe", which contained two different "Counts" therein for two separate residences located at 731 West Wood Street in Decatur, Illinois, and 729 West Wood Street in Decatur, Illinois (R5).

The first "Count", involving 731 West Wood Street, and the alleged occupant thereof, Mark Erbes, reads as follows:

> "I, John Doe, state that within the past seven (7) days I have been inside the apartment located at 731 West Wood Street, Decatur, Macon County, Illinois, on two different occasions and on each occasion I did observe a substance in the premises described to me by Mark Erbes, occupant of said premises, as being cannabis, commonly known as marijuana. Also within the past Seven (7) days while inside these premises, occupied by Mark Erbes, I have observed Mark Erbes sell a quantity of this substance to a third unknown person. Your complainant states that he has seen and smoked cannabis in

> the past and the substance that Mark Erbes possesses in his apartment and the substance he sold in your complainant's presence does appear to be cannabis".

The second "Count", involving 729 West Wood Street, and the alleged occupant thereof, David Weller, reads as follows:

> "Your complainant, John Doe, states that within the past Seven (7) days he has been inside the apartment located at 729 West Wood Street, Decatur, Macon County, Illinois, on two different occasions and on each occasion he did observe a substance in the premises described to him by David Weller, occupant of said premises, as being cannabis, commonly known as marijuana. This substance also appeared to your complainant as cannabis. Based on the foregoing, your complainant believes that the above named substance will be found in the above described premises."

From the second aforesaid "Count", Associate Circuit Judge, Jerry L. Patton, issued a Warrant on October 27, 1975, to search the premises of 729 West Wood Street in Decatur, Illinois, and the person of David Weller, directing

as things to be seized: "An unknown quantity of Cannabis, Sativa L., commonly known as marijuana" (R5).

The search was executed on October 28, 1975, and the proceeds thereof listed on an inventory, showing, inter alia, a quantity of cannabis and seven red capsules were seized. (R9) Mark Erbes, Robert Schollenbruch and the Defendant were taken into custody, charged with "Unlawful Possession of Cannabis" in violation of Chapter 56 1/2, Section 704 (d), ILL. REV. STAT. 1973 (R10), and later, "Unlawful Possession of a Controlled Substance", in violation of Chapter 56 1/2, Section 1402(b), ILL. REV. STAT. 1973, in that they had in their possession a quantity of a controlled substance, to wit: Ethclorvynol. (R27).

The charges against Mark Erbes and Robert Schollenbruch were dismissed at a Pre-

liminary Hearing, in that the People failed to sustain their burden of proof (R2), after which Defendant was separately charged with "Unlawful Possession of Cannabis" (R10), and "Unlawful Possession of a Controlled Substance" (R29) on November 21, 1975.

Defendant's counsel filed several Motions:

1. Motion for Disclosure, wherein Defendant requested that the Plaintiff inform him of the actual person signing the above described search warrant.

2. Motion to Dismiss, wherein Defendant claimed he was entitled to a dismissal based on the Plaintiff's failure to comply with the above Motion for Disclosure.

3. Motion to Suppress wherein Defendant claimed the above search warrant was not based upon a Complaint setting probable cause and that the search and seizure carried out by the Decatur Police was outside the scope of said search warrant.

4. Supplement to Motion to Suppress wherein Defendant claimed said search warrant was based upon various information as to the person to be served and his residence in that certain search warrant indicating that David Weller resided at 729 West Wood Street, Decatur, Illinois, but that the City of Decatur Police De-

partment was aware that said David Weller's residence was 47 Oak Ridge Drive, Decatur, on the date in question.

5. Additional Supplement to Motion to Suppress wherein Defendant contended the above search warrant was defective in that the person executing the Complaint upon which said search warrant was based used a fictitious name in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

The above Motions were heard by the Court and denied on December 2, 1975 as per the written Order attached hereto.

The People of the State of Illinois and the Defendant entered into a Stipulation of Facts wherein it was conceded, inter alia, that three bags of marijuana, three pipes and seven red capsules were seized in the apartment at 729 West Wood Street pursuant to a search warrant on October 28, 1975, but the Defendant maintained his objection thereto and entered his plea of "not guilty". A finding and judgment of guilty as to both charges was entered on December 16, 1975,

by Judge Rodney A. Scott.

On the 31st day of December, 1975, Defendant filed Post-Trial Motions requesting a new trial based upon the Court's erroneous rulings upon the Motions presented. Such Motions were denied on January 8, 1976. On January 8, 1976, Defendant's application for probation was also denied and he was sentenced to a two to ten year term in the Illinois State Penitentiary.

Defendant's counsel filed a Notice of Appeal on January 8, 1976. Upon appeal, the Defendant sought a reversal based upon the following issues:

> The trial Court erroneously denied Defendant's Motions to Suppress by finding it had no jurisdiction to review the question of probable cause as to facts set forth on the face of the Complaint for search warrant.
>
> The Complaint requesting a search warrant for the premises of 729 West Wood Street in Decatur, Illinois, did not establish probable cause.

> The seizure of a "Controlled Substance" although contraband, was inadmissible as evidence, in that the said "Controlled Substance" was not described in the warrant as one of the things to be seized.
>
> The use of a fictitious name upon the Complaint for search warrant in the instant case rendered the Complaint void.
>
> The trial Court commited reversible error and denied Defendant due process of law by refusing to disclose the identity of the "John Doe" informant in violation of the 14th Amendment to the United States Constitution.

During the pendency of the Defendant's appeal, he was released on an Appeal Bond set by the Circuit Court of Macon County. On the 3rd day of February, 1977, the Appeal Court affirmed the trial Court's judgment. (See copy of Opinion attached hereto)

On the 25th day of February, 1977, Defendant's attorney submitted to the Appellate Court an Affidavit of Intent to seek review by the Illinois Supreme Court. As a result of said

Affidavit, the mandate of the Appellate Court was stayed pending Appellant's Petition for Leave to Appeal to the Supreme Court, which Petition was filed on March 30, 1977. Within said Petition, the reasons set forth were the same as set forth by Defendant within Defendant's Appellate Brief. This Petition was denied on May 26, 1977. (See letter attached hereto) On June 3rd, Defendant filed a Petition in the Appellate Court to stay the mandate of that Court which Petition was allowed on June 9, 1977, pending Certiorari. (See letter attached hereto)

ARGUMENT

MERITS OF PETITIONER'S CLAIM

I

THE USE OF A FICTITIOUS NAME UPON THE COMPLAINT FOR SEARCH WARRANT IN THE INSTANT CASE RENDERED THE WARRANT VOID.

By incorporating the Fourth Amendment, Mapp vs. Ohio (1963) 367 U.S., 6 L. Ed. 2d 1081, 81 S. Ct. 1684 and Ker vs. California (1963) 374 U.S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623, the Fourteenth Amendment requires that "no warrants shall issue, but upon probable cause supported by Oath or affirmation." In Pugh vs. Pate 7 Cir., 401 F 2d 6 (1968), the Seventh Circuit of the United States Court of Appeals interpreted this requirement as precluding hiding the identity of the affiant or affirmant by use of a false name. The Court reasoned that the use of a false name would have

the same practical effect as the use of no name and would deprive the defendant of the benefit of the requirements of the Fourth Amendment which requirements "must be strictly adhered to" and which "guaranties are to be liberally construed to prevent impairment of the protection extended." In so holding, the court followed the reasoning set out in King v. US 4 Cir 282 F 2d 398 (1960). Although King v. US, supra, involved a Federal prosecution and the Federal Rules of Criminal Procedure, the court in Pugh vs. Pate, supra, specifically held that in a state prosecution:

> "the fourth amendment itself, in requiring an oath or affirmation, precludes hiding the identify of the affiant or affirmant by use of a false name."

The petitioner has found no United States Supreme Court cases involving a fictitious affiant, but respectfully suggests that the Complaint for Search Warrant in the instant case was insuffi-

cient for the issuance of the Search Warrant for the reasons stated in Pugh vs. Pate, supra.

The defendant's situation was further complicated by the refusal to disclose the identity of this affiant, essential to any adequate review of the issuance of the search warrant. While the Supreme Court has held that disclosure of the identity of a person supplying information to the affiant is not always required, the affiant (most often a police officer) must testify fully and be subject to cross-examination regarding the reliability of such information and informant. McCray v. Illinois, (1967) 386 U.S. 300, 18 L. Ed. 2d 62, 87 S. Ct. 1056. In the present case, not only was the affiant's name withheld, but he was, thereby, precluded from giving evidence essential to the defendant.

II

THE COMPLAINT REQUESTING A

SEARCH WARRANT FOR THE PREMISES OF 729 WEST WOOD STREET IN DECATUR, ILLINOIS, DID NOT ESTABLISH PROBABLE CAUSE.

In addition to the above, the Complaint for Search Warrant was defective because there was insufficient information upon which to conclude that the items sought would be found in the place to be searched. The second, unrelated "Count" merely alleged that "a substance" which the affiant believed to be marijuana, and was told was marijuana, was seen by affiant at 729 West Wood Street in Decatur, Illinois, on two different occasions within the past Seven (7) days. This "Affidavit":

(a) failed to allege a specific large quantity of the substance alleged to be marijuana, which might lead a reasonable person to believe some might remain on the premises after, or somewhere during a period of time described

as within "the last Seven (7) days", and

(b) failed to allege either sales or distribution of the said substance by Defendant or anyone else in the premises at 729 West Wood Street, in Decatur, Illinois, which might lead a reasonable person to believe some might remain on the premises after or somewhere during a period of time described as within "the last Seven (7) days";

While it is hornbook law that the evidence necessary to establish probable cause means less than that which would justify a conviction, the above described facts do not even demonstrate probable cause. Petitioner finds no United States Supreme Court cases similar to the facts present herein, but finds several State Supreme Court cases with similar facts.

The Indiana Supreme Court, in McCurry vs. State, 231 N.Ed. 2d 227, (1967), reversed a

conviction for narcotics possession, holding that the affidavit supporting the search warrant lacked probable cause. The affiant in McCurry,supra, alleged that he believed and had good cause to believe that marijuana was concealed in McCurry's residence and, that reliable information was received from an individual who had received such narcotics at the said address. The Court reviewed the issues of hearsay evidence and probable cause and held that the affidavit fell far short of meeting the standards laid out in cited cases therein and thus decided that while hearsay evidence may indeed be permitted to obtain a search warrant, there must be adequate showing of the credibility of the informant and the likelihood that contraband remained on the premises to be searched.

Further, in Ashley vs. State, 241 N.E. 2d 264 at 269 (1967), it was decided by the Indiana Supreme Court that possession of cannabis in a

certain residence on one date did not establish probable cause for the issuance of a search warrant several days later, and elaborated thereon by stating, at 269:

> "Although there can be no precise rule as to how much time may intervene between the obtaining of the facts and the issuance of the search warrant, in dealing with a substance like marijuana, which can be easily concealed and moved about, probable cause to believe that it was in a certain building on the third of the month is not probable cause to believe that it will be in the same building eight days later."

Similarly, in People vs. Wright,367 Mich. 611, 116 N.W. 2d 786 (1962) the Michigan Supreme Court ruled that a Search Warrant was not issued on probable cause given the following facts: the affiant indicated that he had entered the defendant's club on February 18th and had observed gambling and the unlicensed sale of liquor on the premises. On this basis, a search

warrant for liquor and gambling paraphenalia was issued on February 24th. Another affidavit was also submitted in support of the warrant; it stated that a police officer had conducted a surveilance of the premises, but did not indicate the results of this surveilance. In so ruling, the Court explained as follows:

> "Powell's affidavit related facts six days stale. The factual situation presented by that affidavit, without more, was too remote to justify the issuance of a search warrant." Wright, P. 788

Although obviously of no binding authority, Petitioner submits these cases for consideration by the court and maintains that the Search Warrant issued in the present case was similar to the warrantsoverturned in these cases and not based upon probable cause.

NECESSITY FOR CERTIORARI

Contrary to the above reasoning, the Supreme Court of Illinois has interpreted the United States Constitution as not precluding hiding the identity of the affiant or affirmant. People v. Stansberry 1971, 47 ILL. 2d 541, 268 N.E. 2d 431, cert. denied, 404 U.S. 873, 92 S. Ct. 121, 130 L. Ed. 2d 116. This decision directly conflicts with the decisions of the United States Fourth and Seventh Circuit Courts of Appeal as set out above. These conflicting decisions have resulted in an inconsistent application of the United States Constitution. In so holding in People v. Stansberry, supra, the court explained, in this regard, that they were not bound by the court's decision in Pugh vs. Pate, supra, but would only be bound by a ruling by the United States Supreme Court.

In addition, the present facts warrant

consideration because of the importance of the matter involved. Petitioner recognizes that this court did deny certiorari in People v. Stansberry, supra, in 1971. However, since that time, by this Court's decision in Stone v. Powell, 96 S.C. 3037 (1976), this petitioner is precluded from obtaining a vindication of his rights by Writ of Habeas Corpus. Consequently, the defendant's ability to secure the rights guaranteed him by the United States Constitution rests upon review by this court.

WHEREFORE, Petitioner respectfully prays that this court grant petitioner's request for a Writ of Certiorari.

Respectfully submitted,

RONALD L. CARPEL
Attorney for Defendant-
Petitioner

RONALD L. CARPEL
Attorney for Defendant-Petitioner
P. O. Box 309
129 South Water Street
Decatur, Illinois 62523
422-8000 (217)

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge

HONORABLE FREDERICK S. GREEN, Judge

HONORABLE JOHN T. REARDON, Judge

Attest: ROBERT L. CONN, Clerk

BE IT REMEMBERED, that to-wit: On the 3rd day of February, A.D., 1977, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

Exhibit "A"

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 13643 — Agenda No. 77-25

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from Circuit Court Macon County 75-CF-595
Plaintiff-Appellee	)	
v.	)	
WILLIAM R. HALL,	)	
Defendant-Appellant.	)	

Mr. JUSTICE GREEN delivered the opinion of the Court:

After a bench trial upon the stipulated facts in the Circuit Court of Macon County, defendant William R. Hall was convicted of the offenses of unlawful possession of cannabis and unlawful possession of a controlled substance. A sentence of 2 to 10 years imprisonment was imposed on the conviction involving a controlled substance and the conviction for possession of cannabis was vacated.

Defendant appeals. We affirm.

On Oc tober 27, 1975, John Doe (a fictitious name) appeared before an associate judge in the Circuit Court of Macon County and signed and swore to a complaint for search warrant. On the basis of that complaint, two search warrants were issued directing police to search two Decatur apartments and seize an unknown quantity of cannabis. Pursuant to one on those warrants, Decatur City Police searched defendant's apartment and seized a quantity of marijuana and a plastic bag containing seven red capsules. The capsules were analyzed by the Illinois Bureau of Identification and identified as ethclorvinyl, a controlled substance.

Defendant contends that the trial court erred in denying his motions (1) to suppress all evidence obtained as a result of the search and (2) to disclose the identity of the complainant for the search warrant. The motions were heard at the same time and no evidence was presented upon either motion.

Defendant argues that at the hearing on the motion to suppress the seized evidence, the trial judge ruled that he could not countermand the determination made by the issuing Judge that the complaint showed probable cause. The report of proceedings upon that hearing makes clear that such was not the case. The trial judge heard arguments on the questions of the sufficiency of the complaint and concluded that probable cause was shown for the issuance of a warrant to search the premises where the contraband was seized.

We agree. The fictitious complainant stated that on two occasions in the past seven days, he had been in the apartment subsequently described in the search warrant and on each occasion observed a substance he believed to be marijuana. De-

fendant contends that because of the time lag between the complainant's observations and the presenting of the complaint, the complaint did not show probable cause to believe that the contraband was still in the apartment. He asks that we follow the decision in Ashley v. State (1967), 251 Ind. 359, 240 N.E. 2d 264, where an eight day delay between a complainant's observance of marijuana in a house and the issuance of a warrant to search the house was held to be too long. That court noted that marijuana was a substance that could easily be concealed or moved and would not be as likely to be kept in one place for as long a time as some other types of contraband. In People v. Montgomery (1963), 27 Ill.2d 404, 189 N.E. 2d 327, the Supreme Court ruled that probable cause was not negated by an eight day delay between the time a complainant purchased narcotics at an address and the issuance of a warrant to search those premises. The opinion indicated that a much longer delay would not have prevented a finding of probable cause. In the instant case, although no sale took place, the marijuana was seen in the apartment on two occasions thus indicating more likelihood that the marijuana would continue to remain there for a substantial period. If, as would likely be the case, the complainant viewed the marijuana on separate days, the time lag would be less than seven days.

Defendant asks that we follow the decision in United States ex rel. Pugh v. Pate (1968), 401 F 2d 6, holding a warrant issued upon the basis of a complaint signed with a ficticious name to be invalid. He recognizes, however, that the courts of this state have not followed that ruling. (People v. Stansberry (1971), 47 Ill. 2d 541, 268 N.E. 2d 431, cert. denied, 404 U.S. 873, 92 S.Ct. 121, 30 L.Ed.2d 116; People v. Jackson (1976), 37 Ill.

App. 3d 279, 345 N.E.2d 509.) We follow the Illinois precedent.

Defendant maintains that the seizure of the bag containing the seven red capsules was improper because this item was not described in the warrant as an item to be seized. At the hearing on the motion to suppress, the court had before it the complaint for the search warrant, the warrant and the inventory of things seized. No evidence was offered by either side to supplement these items. Section 114-12 (b) of the Code of Criminal Procedure (Ill. Rev. Stat. 1975, ch. 38, par. 114-12(b)) provides that the burden of proof on a motion to suppress evidence improperly seized rests upon the defendant. That provision, however, is interpreted in such a way as to be consistent with the holding in Vale v. Louisana (1969), 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409. (People v. Normant (1975), 25 Ill. App.3d 536, 323 N.Ed.2d 553.) In Vale an accused upon coming outside of a dwelling house was arrested pursuant to an arrest warrant. A warrantless search of the house was then made by the arresting officers. The opinion emphasized that a warrantless search of a dwelling was permitted only upon exceptional circumstances and then stated that the burden rested upon the State to prove such exceptional circumstances. Here the warrant authorized the search of the entire apartment. Where, under such circumstances officers discover items which appear to be contraband, the items may be seized. (People v. Philyaw (1975), 34 Ill. App.3d 616, 339 N.E. 2d 461.) The ruling in Vale does not place upon the State the burden of proving the propriety of the instant seizure.

The court properly denied the motion to suppress.

Defendant's theory that the court's refusal

to require disclosure of the name of the complainant was error is based upon an assumption that at the motion to suppress, he was entitled to introduce evidence that facts set forth in the complaint were inaccurate. Such is not the rule in this state. The determination as to whether probable cause existed for the issuance of the warrant must be based upon the allegations of the sworn complaint or affidavit incorporated therein. (People v. Bak (1970), 45 Ill.2d 140, 258 N.E.2d 34.) The complainant not having been shown to be a witness to the crimes charged, defendant was not entitled to disclosure (Jackson).

Finding no error to have occurred, we affirm.

AFFIRMED.

TRAPP, P.J. and REARDON, J. concur.

STATE OF ILLINOIS

OFFICE OF

CLERK OF THE SUPREME COURT

SPRINGFIELD

62706

CLELL L. WOODS
Clerk

Telephone
Area Code 217
782-2035

May 26, 1977

Mr. Ronald L. Carpel
Attorney at Law
129 S. Water Street
Decatur, Illinois 62523

No. 49409 - People State of Illinois, respondent,
vs. William R. Hall, petitioner.
Leave to appeal, Appellate Court,
Fourth District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

Exhibit "B"

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT

MACON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	
-vs-	)	No. 75-CF-595
WILLIAM HALL, Defendant.	)	

ORDER ON MOTIONS TO SUPPRESS

This cause coming on to be heard on the 2nd day of December, 1975 on Defendant Hall's Motions heretofore filed and allotted for hearing this date.

Defendant Hall's first motion is to suppress or quash search warrant heretofore issued and served. Defendant Hall states that he should be given the name of the informant who testified before the judge issuing the warrant, but agrees that said informant was not a participant in the search

Exhibit "C"

and seizure and would not be a witness in the trial of this defendant. The Defendant Hall further urges that this Court should overrule the finding of the issuing judge that there was probable cause for the issuance of the warrant. The Court rejects the defendant's contention and refuses to hear as though on appeal the findings of the judge issuing the warrant.

The second motions is to suppress the evidence siezed. It is without questions that the evidence was seized pursuant to the warrant and that the warrant covers the seizure as to subject matter. Defendant presents no evidence as to either motion and again attacks the sufficiency of the proceeding on which the warrant was issued.

With no evidence presented on either motion the Court finds that there is no merit in defendant's contentions and the motions are

denied.

Entered: December 2, 1975.

/s/ Rodney A. Scott
Judge

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

SPRINGFIELD 62701

ROBERT L. CONN, Clerk
Telephone
Area Code 217
782-2586

June 9, 1977

Ronald L. Carpel
Attorney at Law
129 South Water Street
P. O. Box 209
Decatur, Illinois 62523

Patrick M. Walsh
State's Attorney
Macon County Building
Decatur, Illinois 62523

Re: People vs. Hall
General No. 13643

Gentlemen:

I have today entered an order of Judge James C. Craven in the above entitled cause, allowing the petition of the appellate for stay of mandate pending certiorari.

Very truly yours,

Exhibit "D"

/s/ Robert L. Conn

Clerk, Appellate Court
Fourth District

RLC:iv

IN THE

Supreme Court of the United States

No. 77-306

WILLIAM R. HALL, Petitioner-Defendant, vs. **PEOPLE OF THE STATE OF ILLINOIS,** Respondent-Plaintiff.	Review of the Appellate Court of Illinois, Fourth District. — No. 77-25

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Keenan Printing Company 365

IN THE

Supreme Court of the United States

No. 77-306

WILLIAM R. HALL, Petitioner-Defendant, vs. **PEOPLE OF THE STATE OF ILLINOIS,** Respondent-Plaintiff.	Review of the Appellate Court of Illinois, Fourth District. — No. 77-25

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On October 27, 1975, a John Doe Search Warrant was issued for the search of the residence at 729 West Wood Street. The facts and circumstances, as stated in the warrant, were that John Doe had been in the residence at 729 West Wood Street on two different occasions and that on each occasion he observed a substance in the premises described to him by the occupant of the premises as being cannabis. He stated this substance also appeared to him to be cannabis. The Complaint for the Search Warrant was sworn to and signed by John Doe, a fictitious name, in the presence of Associate Circuit Judge Jerry L. Patton. Accompanying this Complaint for A Search Warrant of 729 West Wood Street, was a second Complaint for Search Warrant for an apartment at 731 West Wood Street, in which the same John Doe stated that he had been in those premises twice during the last seven days and on both occasions, observed a substance in the premises described to him by the occupant of the premises as being cannabis, commonly known as marihuana. He stated, in that Complaint, that he had observed the occupant of those premises sell a quantity of the substance to a third unknown person. He stated also that the substance appeared to him to be marihuana and that he had seen and smoked cannabis in the past. Both of these complaints for each premise were contained on the same Complaint for Search Warrant and signed by the said John Doe in the presence of Associate Circuit Judge Jerry L. Patton.

On the 28th of October, 1975, the search warrant was executed at 729 West Wood Street, and during the course of the search, police officers performing the search discovered a quantity of cannabis and seven red capsules in a

plastic bag. Part of the cannabis was discovered in the top drawer of a dresser in the bedroom. In that same drawer were found the seven red capsules in the plastic bag. See the Stipulation of Facts entered into between the defendant, William Hall, and the People of the State of Illinois. (C. 35)

The the time of the search, the police officers discovered the owner and occupant of the apartment searched was William R. Hall, rather than the person named in the Complaint for Search Warrant, David Weller. William R. Hall was charged with the offense of Unlawful Possession of Cannabis, as was Mark Erbes and Robert Schellenbruch who were present with him in the apartment at the time of the search. Subsequently, Mark Erbes and Robert Schollenburch were dismissed as defendants in the information at Preliminary Hearing. The seven red capsules were determined to be Ethclorvynol. William R. Hall was charged with Unlawful Possession of A Controlled Substance.

A Motion to Suppress Evidence was filed by defendant's counsel along with two supplemental motions to suppress. The substance of the motions to suppress were that the search of the premises at 729 West Wood Street was not based upon a complaint setting forth probable cause, that the Complaint for Search Warrant contained false information, in that it indicated that David Weller resided at 729 West Wood Street when actually the apartment at that address was occupied and possessed by William R. Hall, and third, that the Complaint for Search Warrant was defective, in that a fictitious name was used by the complainant.

A hearing was held on December 2, 1976, at which no evidence was presented and counsel presented argument as to the substance of the motion to suppress. The Court,

during the hearing, indicated that it was not going to redetermine the credibility of the informer on the John Doe Complaint, and the Court found, without question, that the Complaint for the Search Warrant was sufficient. (R. 20) The Court also determined that the identity of John Doe was to be protected. (R. 8) That the statement that John Doe was in the apartment within seven days was not too remote, (R. 18), and that the officers executing the search warrant did not go beyond the scope of the warrant. (R. 22, 23, 24) All of said findings by the Court were based upon the face of the Complaint for Search Warrant and argument of counsel, no evidence having been presented by defense counsel or by the People at the Motion to Suppress Evidence.

The defendant, William R. Hall, on December 16, 1975, was convicted of the offenses of Unlawful Possession of Cannabis, more than 30 grams but not more than 500 grams, and Unlawful Possession of A Controlled Substance, Ethclorvynol. A finding of guilty was entered after a stipulated bench trial in which the only evidence presented were the facts contained in a written stipulation. Whereupon, the defendant was sentenced to a period of two-to-ten years for Unlawful Possession of A Controlled Substance, and one-to-three years for Unlawful Possession of Cannabis, said sentences were to run concurrently.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

The defendant argues that the Trial Court Judge, Rodney A. Scott, committed error by refusing to hear his Motion to Suppress Evidence based on insufficiency of the

warrant. The Court did not refuse to hear the Motion, it stated it would not determine the reliability of the witness, and the Court, after reviewing the face of the Complaint and hearing argument of counsel, found that the Complaint, on its face, was sufficient for issuance of the warrant. (R. 60) The Court only indicated that it was not going to act as an appeal court in determining whether the judge issuing the warrant had sufficient facts to determine the reliability of the witness or the reliability of the information supplied. The Court did determine that there were sufficient facts on the face of the Complaint for the Warrant to issue. (R. 20)

The defendant next argues that the Complaint, containing in actuality two Complaints for Search Warrant, was insufficient to support the search of the residence at 729 West Wood Street which was occupied and possessed by the defendant. His argument centers around the fact that at the second residence named in the Complaint for Search Warrant, the informant made statements that while at 731 West Wood Street, he saw the occupant of those premises make a sale of the marihuana, while in the Complaint for the Search Warrant of 729 West Wood Street, no such allegation was made. He, therefore, argues that there were insufficient facts in the Complaint for a judge to determine there was still cannabis present at 729 West Wood Street; but the warrant itself states that the informant was present at 729 West Wood Street on two different occasions within the last seven days. On each of those occasions, he saw the cannabis present in the apartment, that the occupant in the apartment told him each time that the substance was cannabis, and that the informant stated that the substance appeared to him to be cannabis. The defendant argues that without alleging prior sale, distribution, or the presence of substantial quantities in the Complaint for 729

West Wood Street, a cautious and reasonable person could not reasonably determine that said substance was still in the apartment. The defendant complains that without this alleging of prior sale or large quantities being present, the Complaint for the Search Warrant was insufficient and lacking probable cause. His chief argument is that when a search warrant is issued upon a complaint based on hearsay testimony, which he evidently feels is the case here, a judge must have a substantial basis for leading cerdibility to both the evidence and the informant. He then equates a large quantity of marihuana or the sale of marihuana to the substantial basis for the judge to lend credibility to the evidence and the witness, when actually the amount of marihuana involved or whether it has been sold or not, is irrelevant to the fact of whether there is sufficient cause to believe it may still be present in the premises. The defendant relies on *McCurry* v. *State,* 231 N.E. 2d 227, a 1967 Indiana case for authority. His argument is completely without merit as the search warrant issued in the case before the court was not based upon heresay information. The informant himself apeared before the judge issuing the warrant and the judge determined that the informant was credible and the information was reliable. Where in *McCurry* v. *State,* the complainant was a police officer whose information, stated in the Complaint, came from an informant who did not sign the Complaint or appear before the issuing magistrate.

In *People* v. *Bak,* 35 Ill. 2d 140, 258 N.E. 2d 341 (1970), which states the law in Illinois. The Illinois Supreme Court holds that a judicial officer need find only probable cause for the issuance of a search warrant on the evidence presentered to him under oath. In the case before the Court, the issuing judge had the affiant before him and was able to determine his credibility for himself and the evidence with

which he was presented was more than sufficient for him to find probable cause. That evidence being: that the affiant had been in the apartment on two different occasions within seven days prior to the warrant, that on each of these occasions he saw a substance which appeared to him to be marihuana, having seen and used marihuana himself, and that the occupant of the apartment told him on each occasion that the substance was marihuana. From these facts, I submit, a judge has more than sufficient basis to find probable cause to issue a search warrant if the credibility of the informant is proved and, here, the judge was able to judge the credibility of the informant for himself.

Defendant next contends that the fact that on one occasion contraband was observed at a certain place does not establish that it would still be there several days later. He cites an Indiana case, *Ashley* v. *State,* 241 N.E. 2d 264, 269 (1967), in which the Indiana Supreme Court determined that a period of eight days between the time of the observing the contraband and the time of the complaint is too remote for there to be any determination that the contraband or material is still present in the premises. Based on this Indiana decision, defendant asks this Court to determine that an informant's statement that he had been inside an apartment, twice within seven days, and observed on each occasion the contraband material, makes it too remote for a judge to determine that the substance was still in the apartment. There has been no determination as to what amount of time, between the time of the Complaint and the time of observations, which would make the information too remote for finding a probable cause, but the Illinois Supreme Court, in *People* v. *Montgomery,* 27 Ill. 2d 404, 189 N.E. 2d 327 (1963), held that eight days was not too much time to make it too remote to find probable cause. The informant, in this case, had been there on two

separate occasions within seven days and on each of these occasions the marihuana was present. This is a sufficient fact for a court to determine that the marihuana was probably still in the apartment.

The defendant also contends that the fact that there were two specific places named in the Complaint for the search warrant, with separate facts and, therefore, two specific Complaints, if one of those Complaints does not show sufficient cause for the issuance of the search warrant, the search warrant itself must fail and a search of either of the apartments would be illegal, and any evidence obtained would be inadmissible. Defendant's position is that the search warrant naming 731 West Wood Street alleged a sale or distribution of the marihuana and concedes the search warrant may be sufficient for the search of 731 West Wood Street, as additional facts are given which would lead a reasonable person to believe that some of the marihuana may still be in the premises. He contends, however, that at 729 West Wood Street, there are no such facts as a distribution or sale of marihuana or allegation of a specific large quantity from which a court could determine that the marihuana may still be on the premises and, therefore, the warrant must fail, but as stated earlier, there need be no specific allegation as to a sale or specific large quantities, only probable cause that the contraband was there. The presence, in any premises, of any quantity of marihuana is sufficient for the issuance of a warrant so long as there is a sufficient basis for a court to determine that the evidence is reliable and the person supplying the evidence is credible. *People* v. *Bak,* supra. To support his argument, the defendant relies on *People* v. *Rainey,* 197 N.E. 2d 527 (1964), which dealt with the problem of a warrant being issued to search a building containing multiple residences. The warrant gave the address and appoxi-

mate location of the building. Police officers went to the building and when they arrived they found two different apartments in the building. The police officers searched both of the apartments and in the front apartment found the contraband for which they were looking. The Court found that the search was an invalid search since the warrant did not specifically name the apartment for which they were to search. In our Complaint naming the residences of 729 and 731 West Wood Street in Decatur, Illinois, each of the residences were specifically described and there was probable cause as to the issuance of a search warrant for the search of each of the premises. The fact that the complainant did not observe the sale of marihuana at 729 West Wood Street has no significance to whether there was probable cause or not, the only difference between 729 and 731 West Wood Street being that there were facts establishing other crimes at 731 West Wood Street.

The defendant further argues the seizure of anything other than the marihuana named in the warrant was illegal, naming specifically the seven red capsules found by the police during the search of 729 West Wood Street. He claims that since the red capsules were not named in the search warrant as a substance to specifically be seized, that the police officers went beyond the scope of the warrant, therefore, the evidence of these capsules was inadmissible and should be suppressed, as they were not in plain view or shown to be found by the police as a result of a lawful search and seizure without a warrant. At the Motion to Suppress Evidence, the defendant did not present any evidence showing that the police officer did not make the search in good faith or went beyond the scope of the warrant. The police officers, when they went to the apartment at 729 West Wood Street, went there under the authority of a warrant and made a search pursuant to that warrant. During the

course of that search, they wound not only what they were looking for, the marihuana named, but also found the seven red capsules. These seven red capsules were found in the same drawer in which the police officers found marihuana, as stated in the stipulation of facts presented at trial. It is the law in Illinois that where police officers have prior justification for a search, in the course of which they inadvertently discover other items which are apparent to the officers as being evidence of other crimes, they may seize these items inadvertently discovered. See, *People* v. *Philyaw,* 339 N.E. 2d 461 (1975); *Coolidge* v. *New Hampshire,* 403 U.S. 433, 91 S. Ct. 20, 22, 29 L. Ed. 2d 564, as long as the search by the police officers is directed in good faith. See, *Warden* v. *Hayden,* 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782. The officers, therefore, in the apartment at 729 West Wood Street pursuant to a search warrant, were at a place where they had a right to be and while there, they performed a search pursuant to the warrant searching for marihuana which the warrant stated was to be seized, and while performing the search, found marihuana in a dresser drawer in the bedroom and also found seven red capsules in a plastic bag in the same drawer. This inadvertent discovery by the officers during the search of 729 West Wood Street revealed to them a substance which apparently to them was contraband. They, therefore, were perfectly within their rights to seize this substance. Therefore, the seizure of the seven red capsules was a lawful seizure and the refusal of the trial judge to suppress this evidence was proper.

II.

THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING TO ORDER DISCLOSURE OF THE IDENTITY OF THE JOHN DOE INFORMANT.

Defendant claims the use of a fictitious name on the Complaint for Search Warrant renders the Complaint void. He cites *U.S. ex rel. Pugh* v. *Pate,* 401 F. 2d 398 (1968). Such is the rule in the Federal District Court, but the Illinois Supreme Court has ruled that such a search warrant in the State of Illinois is a valid warrant. See, *People* v. *Stansbury,* 47 Ill. 2d 541, 268 N.E. 2d 431 (1971).

Defendant's final contention is that the trial court's refusal to have the State name the informant to the Complaint for the Search Warrant was error under *People* v. *Rivera,* 130 Ill. Ap. 2d 321, 264 N.E. 2d 699 (1970). *People* v. *Rivera* states that a search warrant, which is issued pursuant to a complaint by a undisclosed informant, is a valid warrant, but that the trial judge should order the State to disclose the informant where there is a showing of fundamental unfairness or prejudice to the defendant. The defense counsel claims that the fact the Complaint for the Search Warrant stated that David Weller was the occupant of the premises at 729 West Wood Street was incorrect information, therefore, they had a right to the name of the undisclosed informant for the purpose of challenging the veracity of the entire Complaint. There was no other showing or evidence presented by defendant to show fundamental unfairness or prejudice to him. The only thing shown by defendant is that the Complaint for the warrant named David Weller as the occupant of the premises when actually William R. Hall was determined to be the occupant of the premises. This, in and of itself, is not a showing of fundamental unfairness to the defendant or prejudice. The

informant stated that he had seen the contraband at a specific place on two occasions within seven days. This he testified to under oath before the issuing judge. The police went to this specific place and found the items which were named in the warrant. The fact that the person named in the warrant was not there or was not shown to have been an occupant of the premises is completely irrelevant and immaterial to the cause against William R. Hall, since William R. Hall was discovered to be the occupant of the premises. In his argument, the defendant claims that the City of Decatur Police Department had arrested David Weller prior to the search at 729 West Wood Street, at which time David Weller gave a different address, that being 747 Oakridge Drive. Therefore, the police officers should have known that the premises in question did not belong to David Weller, and being aware of this, knew that the search warrant was incorrect. This showing, by itself, shows no prejudice or fundamental unfairness to the defendant, as David Weller may have been a constant visitor to the apartment, or in some way was connected with William R. Hall and with the items which were found in the apartment. And without this showing of prejudice or unfairness, the identity of the informer should be protected, and the discovery that the department belonged to William R. Hall instead of David Weller in no way prejudiced the defendant. The Court, therefore, had no other alternative than to determine disclosure of the unnamed informant would not be allowed.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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